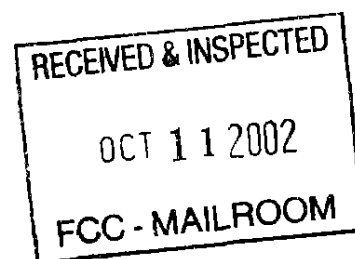


Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

02-276



In the Matter of)
)
Disposition of Down Payments and)
Pending Applications for Licenses Won)
During Auction No. 35 for Spectrum)
Formerly Licensed to NextWave Personal)
Communications Inc., NextWave Power)
Partners, Inc., and Urban Comm - North)
Carolina, Inc.)

COMMENTS OF ONQUE COMMUNICATIONS, INC

ONQUE COMMUNICATIONS, INC hereby submits its comments concerning the Commission's proposed disposition' of down payments and pending applications for licenses won during Auction No. 35, which were formerly licensed to NextWave Personal Communications Inc., NextWave Power Partners Inc., (collectively "NextWave") and Urban Comm - North Carolina, Inc ("UrbanComm").²

As we explain below, the Commission should not grant further relief to the Auction No. 35 winners without also granting relief to the winners of Auction No. 5, which began the C-block auction process. Despite the Auction No. 35 winners' knowing assumption of the obligations they now seek to disavow, the Commission

¹ *Commission Seeks Comment on Disposition of Down Payments and Pending Applications for Licenses Won During Auction No. 35 for Spectrum Formerly Licensed to NextWave Personal Communications Inc., NextWave Power Partners, Inc., and Urban Comm - North Carolina, Inc.*, WT Docket No. 02-276 (rel. Sept. 12, 2002) (the "Notice"); see also *Commission Seeks Comment on Disposition of Down Payments and Pending Applications for Licenses Won During Auction No. 35 for Spectrum Formerly Licensed to NextWave Personal communications Inc., NextWave Power Partners, Inc., and Urban Comm - North Carolina, Inc.*, WT Docket No. 02-276 (rel. Sept. 12, 2002) (correcting comment date and reply comment date in the Notice),

² ONQUE COMMUNICATIONS, INC hereby incorporates by reference its (7) Petition for Emergency Relief (filed Nov. 7, 2001); (2) Opposition to Joint Request for Immediate Refund of Auction No. 35 Down Payments for NextWave Licenses (filed Jan. 17, 2002); and (3) Petition for Reconsideration (filed Apr. 26, 2002).

already has returned the bulk of their down payments. Permitting the Auction No. 35 winners to avoid their auction obligations altogether would undermine the integrity of the Commission's auction process. Such action also would discriminate against and disadvantage further the genuinely small businesses that were subject to much harsher treatment by the Commission after the failure of the predecessor auction, Auction No. 5, which began this long and increasingly unfair process.

The Commission's suggestion that extraordinary relief for "small businesses"³ such as Verizon and T-Mobile may be warranted by changed economic conditions is ironic, given the back-of-the-hand treatment given to truly small businesses in Auction No. 5. Changed economic conditions also thwarted their plans, when the capital markets closed to Auction No. 5 winners as the result of NextWave's manipulation of the auction process. Using a double standard in response to changed economic conditions suggests a government policy that applies the rigors of capitalism to small businesses, but treats huge enterprises as a protected class. Far from serving the public interest, such an approach undercuts public confidence in the FCC and the fairness of its processes.

I. AUCTION NO. 5 WINNERS FACED CHANGED ECONOMIC CONDITIONS POST-AUCTION BUT WERE HELD TO THEIR OBLIGATIONS.

The licenses at issue in this proceeding were awarded originally in 1996, as part of the auction of C-block licenses." In Auction No. 5, NextWave bid up the value of the licenses by bidding nearly three times what winning bidders in the prior A and B Block auctions had paid. As a result of NextWave's exorbitant bids and its subsequent

³ Notice at 2.

⁴ See "Wireless Telecommunications Bureau Announces Conditional Grant Of Broadband Personal Communications Services Entrepreneurs' C-block Licenses To NextWave Personal Communications, Inc. - Final Down Payment Due By January 10, 1997," *Public Notice*, DA 97-12 (rel. Jan. 3, 1997); In re Applications of NextWave Personal Communications Inc. for Various C-block Broadband PCS Licenses, *Memorandum Opinion and Order*, 12 FCC Rcd 2030, 2034 (1997).

bankruptcy, C-block winners, including ONQUE COMMUNICATIONS, INC, were unable to obtain necessary financing to construct their networks.

Recognizing the failure of Auction No. 5, the Commission offered winning bidders the “option,” really a Hobson’s choice, of forfeiting their down payments and returning their licenses, forfeiting half of their down payments and returning half of their licenses, or paying full price and keeping their licenses.⁵ In light of changed economic conditions, ONQUE COMMUNICATIONS, INC and many other small businesses had no choice but to return their licenses and forfeit their down payments. In so doing, they were also precluded from reacquiring their surrendered licenses for two years from the date of any reauction of those licenses.⁶ They lost millions of dollars in down payments. Worse, they were denied the business opportunities that Congress and the Commission intended for small business entrepreneurs, minorities, and women.

This must be contrasted to the treatment that the Commission already has accorded the Auction No. 35 winners and the additional relief for them that the Commission has proposed. The Commission already has granted Auction No. 35 winners unprecedented relief from their down payment requirements, relief that was specifically denied to Auction 5 winners? Now, the Commission proposes to offer Auction No. 35 winners either: (1) a full refund of all down payments and an opportunity to dismiss all applications (“full refund option”) or (2) an opportunity to dismiss some applications and receive a refund of either all down payments or the

⁵ In the Matter of Amendment of the Commission’s Rules Regarding Installment Payment Financing for Personal Communications Services (PCS) Licensees, *Second Report and Order*, 12 FCC Rcd 16436 (1997); In the Matter of Amendment of the Commission’s Rules Regarding Installment Payment Financing for Personal Communications Services (PCS) Licenses, *Order on Reconsideration of the Second Report and Order*, 13 FCC Rcd 8345 (1998); In the Matter of Amendment of the Commission’s Rules Regarding Installment Payment Financing for Personal Communications Services (PCS) Licensees, *Second Order on Reconsideration of the Second Report and Order*, 14 FCC Rcd 6571 (1999).

⁶ *Reconsideration of C-block Restructuring Second R & O*, 73 FCC Rcd 8345 ¶ 37 (1998).

⁷ *Requests for Refunds of Down Payments Made in Auction No. 35*, Order, FCC 02-99 (rel. Mar. 27, 2002).

down payments associated with the dismissed applications (“selective opt-out option”). Ignoring the disparity in choices accorded Auction No. 5 winners, the Commission hints at compounding that disparity by asking whether the prohibition that applied to Auction No. 5 winners with respect to the reacquisition of the licenses in question should apply to the Auction No. 35 winners.

II. MORE FAVORABLE TREATMENT OF AUCTION NO. 35 WINNERS THAN THAT ACCORDED AUCTION NO. 5 WINNERS CANNOT BE JUSTIFIED.

The Commission’s *Notice* asserts that it comes in response to “a severe downturn in capital markets” and “other economic events.”⁸ But how this situation materially differs from that which faced Auction No. 5 winners is not explained, nor could it be. The Commission should not grant the sweeping relief it now contemplates. Instead of serving the public, such relief would benefit the largest telecommunications entities, while offering no relief for small businesses like ONQUE COMMUNICATIONS, INC that were originally meant to benefit from the auction of the C-block licenses.

There is no difference between the Auction No. 35 winners and the Auction No. 5 winners that justifies more favorable treatment of Auction No. 35 winners. Furthermore, such treatment would disserve the public interest by: (1) impeding small business use of spectrum; (2) undermining the integrity of FCC auctions; and (3) jeopardizing public confidence in the Commission’s even-handed treatment of all those who come before it.

The situation facing the Auction No. 35 Licensees is the result of their informed, self-interested, and strategic business decisions. The Commission specifically cautioned potential Auction No. 35 bidders that on-going litigation could impede timely access to the spectrum and stated, with emphasis, that:

⁸ Public Notice at 3

*Potential bidders are solely responsible for identifying associated risks, and investigating and evaluating the degree to which **such** matters **may** affect their ability to bid on or otherwise acquire licenses in Auction No. 35.*⁹

There is no equitable reason to free the Auction No. 35 winners from the consequences of their informed decision now that their calculated risk has not been rewarded. The simple fact is that value of the licenses that they acquired may have dropped while they waited for litigation to be concluded. In the current economic environment, it is likely that the value of their other assets has dropped as well and any debt incurred in acquiring those assets is burdensome, but that is their business risk.

Nonetheless, if the FCC is sympathetic to the plight of the Auction No. 35 winners and wishes to grant relief, it must do so in a manner that is fair and equitable to the Auction No. 5 winners, who also were caught up in a declining market for the licenses that they acquired in the auction. The Auction No. 5 winners must be treated at least as well as the Auction No. 35 winners.

First and foremost, less favorable treatment of the Auction No. 5 winners would contravene Congressional and Commission policy. The frequencies auctioned in Auction No. 35 were originally reserved for small business entrepreneurs and other designated entities, but the Auction No. 35 winners include some of the largest telecommunications entities in the world. Providing these entities with more favorable treatment than the small businesses that prevailed in Auction No. 5 would undermine the Congressional policy to avoid "excessive concentration of licenses and [disseminate]

⁹ C And F Block Broadband PCS Spectrum Auction Scheduled For December 12, 2000 Notice and Filing Requirements for 422 Licenses in the C and F Block Broadband PCS Spectrum Auction, 15 FCC Rcd 19485, 19493 (2000) (emphasis in original); see also Sept. 6, 2001, Public Notice at 17256 (emphasis in original).

licenses among a wide variety of applicants, including small businesses, rural telephone companies and businesses owned by minorities and women. . . ."¹⁰

Moreover, unlike the Auction No. 35 winners, the genuinely small businesses like ONQUE COMMUNICATIONS, INC that participated in Auction No. 5 had no role in, nor warning of, the risks associated with NextWave's tactics in the auction and subsequent bankruptcy strategy. Rather, the Auction No. 5 winners played by the rules and suffered the consequences. By contrast, the Auction No. 35 winners have sought at every turn to escape from liability for their Auction No. 35 bids. Granting the Auction No. 35 winners benefits not available to the Auction No. 5 winners would decrease future bidders' incentives to comply with Commission rules and undermine the integrity of the Commission's auction process.

III. THE COMMISSION FINALLY SHOULD ADDRESS COMPREHENSIVELY THE FAILURE AND INEQUITIES OF THE ENTIRE C-BLOCK AUCTION PROCESS.

The failure of the Commission's C-block auction process did not begin with Auction No. 35 and it is wrong for the Commission to offer unprecedented relief for the Auction No. 35 winners, while ignoring the plight of those who participated in Auction No. 5. The Commission must now acknowledge that, because of NextWave's manipulation and swings in the value of C-block licenses over the past six years, it is time to make equitable remedies available for everyone who was caught up in the C-block debacle.

There can be no legal or equitable justification for allowing Auction No. 35 winners a money-back exit from risky obligations they knowingly undertook while continuing to hold the funds of Auction No. 5 participants. While money must be returned to Auction No. 5 participants, including a substantial credit for funds so long

¹⁰ 47 U.S.C. § 309(j)(3)(B); see also *Amendment of Commission's Rules Regarding Installment Payment Financing for Personal Communications Service (PCS) Licenses, Second Report and Order and Further Notice of Proposed Rulemaking*, 12 FCC Rcd 16436, 16438 (1997).

held, the remedy also should include restoration of business opportunities denied to the Auction No. 5 designated entities, whose goal remains participation in the PCS business.

The Commission's own arguments before the Supreme Court support exactly this result.¹¹ In a recent brief, the Commission explained that the relief it now proposes for Auction No. 35 winners is appropriate because it previously provided "analogous" relief to the Auction No. 5 winners to "alleviate the financial consequences of market downturns and other factors."¹² Indeed, according to the Commission, the question now before it is "whether it should offer similar relief to Auction 35 winning bidders."¹³ However, as discussed above, the relief the Commission has provided, and the further relief it proposes, for Auction No. 35 winners is not "similar" or "analogous" to the treatment accorded Auction No. 5 winners.¹⁴

The Commission now has the opportunity, however, actually to do what its brief to the Supreme Court claims to do; that is, to provide equitable relief to the Auction No.5 winners, tailored to the needs of small businesses, as the proposed relief for Auction No. 35 winners is tailored to the needs of large telecommunications companies.

CONCLUSION

¹¹ See Supplemental Response Brief for the Federal Communications Commission, *FCC v. NextWave Personal Communications, Inc.*, Nos. 01-653 and 01-657 (U.S. filed Sept. 30, 2002).

¹² *Id.* at 3, 4.

¹³ *Id.* at 4 (emphasis added).

¹⁴ In particular, as discussed above, while the Auction No. 5 winners were forced to surrender their down payments in order to be released from their payment obligations, the Commission is now considering releasing the Auction No. 35 winners from their **winning** bids without financial penalty. Similarly, a number of the options offered to Auction No. 5 winners included conditions that precluded those winners from bidding on their surrendered spectrum at a future auction, while the Commission is now contemplating relief for Auction No. 35 winners that does not include any bar on future bidding.

Nothing in Commission precedent allows winning bidders in a licensing auction to walk away without penalty from their bid obligations. The Commission should not change its course here solely for the benefit of Auction No. 35 winners, while giving no relief to Auction No. 5 winners.

When the Commission administers its rules, it must do so in an evenhanded manner, equitably providing relief for all who participate in its processes according to its rules. There can be no equity in the C-block auction process that does not fairly provide for the Auction No. 5 winners who lost their down payments, their licenses, and their business opportunities.

Respectfully submitted,

ONQUE COMMUNICATIONS, INC
CLAYBURN C. CURTIS, P.E.
CEO

October 11, 2002